SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 197

ARKANSAS PUBLIC SERVICE COMMISSION

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal from the United States District Court for the Eastern District of Arkansas.

MOTION TO AFFIRM.

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INDEX.

	Page
Statement of the case	2
No substantial question is, in fact, presented	3
Conclusion	9
Certificate of service	10

Cases Cited.

American Express Co. vs. Caldwell (1917), 244 U. S. 617 6

Arkansas Intrastate Freight Rates and Charges, 298 ICC 547 2

Florida vs. United States (1934), 292 U. S. 1 6

Illinois Commerce Commission vs. United States (1934), 292 U. S. 475, 483-484 6

King vs. United States (1952), 344 U. S. 254 ..... 5, 6, 7

Universal Camera Corp. vs. National Labor Relations Board (1950), 340 U. S. 474 ..... 3, 4, 9

Louisiana Public Service Commission vs. United States of America and the Interstate Commerce Commission (1954), 348 U. S. 885 ..... 5, 10

United States vs. Louisiana (1933), 290 U. S. 70 6

Statute Cited.

Interstate Commerce Act:
Section 13 (3) and (4) 2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 1095.

ARKANSAS PUBLIC SERVICE COMMISSION

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal from the United States District Court for the Eastern District of Arkansas.

MOTION TO AFFIRM.

Come now the Arkansas rail carriers, intervening defendants and appellees in the above-entitled case, and, pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of the Supreme Court of the United States, move to affirm the judgment and decree of the District Court on the grounds that the question presented is so unsubstantial as not to need further argument.

In support thereof they respectfully direct attention to the following:

STATEMENT OF THE CASE.

This is a direct appeal from the final judgment of a specially constituted three-judge District Court, which, insofar as here pertinent, found valid and enforceable an Order of the Interstate Commerce Commission requiring certain increases in specified Arkansas freight rates. The rates in question are those applying generally to such commodities as sand and gravel, crushed stone, agricultural limestone, asphalt rock, stone, etc., coated, and silica sand in boxcars. As to each of the intrastate rates in issue, the Arkansas Public Service Commission had previously failed to accord increases comparable to those granted by the Interstate Commerce Commission for application to like interstate traffic.

The involved Interstate Commerce Commission proceeding is its Docket 31660—**Arkansas Intrastate Freight Rates and Charges**, 298 ICC 547. This is a proceeding under Section 13 (3) and (4) of the Interstate Commerce Act, pursuant to which intrastate rates, if found to result in undue prejudice to interstate shippers or to unlawfully discriminate against interstate commerce generally, may be ordered increased as found necessary to remove such unlawfulness. Various cases of similar type have previously received the attention of this Court. The Commission's Order assailed before the statutory District Court is that of September 4, 1956. This Order was issued as the culmination of an Interstate Commerce Commission investigation instituted by the Commission's Order of November 16, 1954. The Commission handling included a three-day hearing before a hearing Examiner, at which time a record represented by over 500 transcript pages and over 90 exhibits was made; the Examiner's Proposed Report recommending all of the increases as sought; the filing of Exceptions by protesting parties; a Reply thereto by the rail carriers; oral argument before the Interstate Commerce

Commission; the Commission's Report of May 7, 1956, and the aforementioned Order of September 4, 1956.

Such Commission proceedings were followed by the District Court action wherein parties in opposition sought to enjoin and set aside the Commission's Order of September 4, 1956. In a decision attached as an Appendix to appellant's Jurisdictional Statement, the three-judge Court unanimously found, insofar as here pertinent, that the Interstate Commerce Commission's Order was valid and adequately supported by proper findings, which, in turn, found adequate support in substantial evidence of record.

The decision of the lower Court upholding the Report and Order of the Interstate Commerce Commission is now presented to this Court on the premise that a substantial question remains for determination.

NO SUBSTANTIAL QUESTION IS, IN FACT, PRESENTED.

The entire subject matter of the instant proceeding has already received the most painstaking and detailed attention. The questions now presented by appellant are noticeably without substance. To the extent that any valid question is raised, it is clearly with regard to matters already authoritatively and properly determined by this Court. We shall briefly consider the contentions of appellant.

The keystone of appellant's position is the **Universal Camera** case, **Universal Camera Corp. vs. National Labor Relations Board** (1950), 340 U. S. 474. Appellant urges that there has here been a misapplication of the there-set-forth standard for determining substantiality of evidence. However, an examination of that case in no wise supports such contention. In the **Universal Camera** case it was held, in effect, that the reviewing Court, in determining whether substantial supporting evidence exists,

may not properly limit its review to that evidence which is favorable to the disposition as made by the administrative agency. It is all too clear in the instant proceeding that the three-judge Court below did not in any sense limit its review, but rather gave careful consideration to the evidence in its entirety. As clearly stated in that Court's decision: "We have carefully read and considered the three-volume transcript of the evidence and the 91 lengthy exhibits, adduced before the Commission." (Appendix to Jurisdictional Statement, Page 37) Actually the case so heavily relied upon by appellant accentuates the soundness and propriety of the three-judge Court's action in the instant proceeding. This is true by reason of the clear indication in the decision itself that all evidence has here been thoroughly considered. Furthermore, in the instant proceeding—unlike the **Universal Camera** case—the recommendations of the hearing Examiner and the disposition of the Commission are in complete harmony, both reaching the same inevitable conclusion on the basis of the weight of convincing evidence of record.

In short, the **Universal Camera** case holds that the reviewing Court must examine the evidence as a whole. The three-judge Court has here clearly and undeniably done just that. Such being the case, there is obviously no justification for further consideration by this Court. The reasoning supporting such conclusion is perhaps best summarized by the following brief exerpt from **Universal Camera Corp. vs. National Labor Relations Board** (1950), 340 U. S. 474, 491:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Patently, the instant situation offers no such occasion for intervention by this Court. Rather, the matter should be disposed of just as was done, for example, in **Louisiana Public Service Commission vs. United States of America and the Interstate Commerce Commission** (1954), 348 U. S. 885. In that very similar proceeding a like attempt to obtain review upon much the same contentions, including the allegation based upon the **Universal Camera** case, was denied and the judgment of the lower Court was affirmed upon motion.

Appellant raises various secondary questions apparently thought of as stemming from the primary premise. Only the briefest individual response is deemed necessary to indicate a consistent absence of substantiality.

Appellant suggests that the Court below erred in recognizing that the evidence, which had formed the basis for the Interstate Commerce Commission grant of comparable increases for interstate application, formed ". . . the natural basis for" the Arkansas Thirteenth Section Order. Such contention is without substance for various reasons. Initially, the observation of the three-judge Court constitutes the clear governing law as expressed in **King vs. United States** (1952), 344 U. S. 254. Secondly, there can be no doubt as to the propriety of the Commission's taking official notice of its own Reports in antecedent interstate proceedings. Thirdly, the Commission's Report and Order in the instant Thirteenth Section proceeding in nowise depends upon evidence outside the record specifically introduced herein. Rather, the voluminous record introduced at the time of hearing before the hearing Examiner contains, insofar as pertinent, much of the same type of material previously submitted in the interstate increase proceeding, and the record so constructed at the three-day hearing provides complete support for each and every finding of the Commission.

In its next secondary contention appellant suggests that the instant record was deficient in that specific expenses of transporting the particular commodities in question in Arkansas intrastate commerce were not presented. It is of course, authoritatively and conclusively settled that in circumstances such as here present, such separation of interstate and intrastate revenues and expenses is neither practical nor necessary. Perhaps the best answer to this particular contention is to be found in the three-judge Court's quotation from **Illinois Commerce Commission vs. United States** (1934), 292 U. S. 475, 483-484, which, in turn cites **American Express Co. vs. Caldwell** (1917), 244 U. S. 617, **United States vs. Louisiana** (1933), 290 U. S. 70 and **Florida vs. United States** (1934), 292 U. S. 1 (Appendix to Jurisdictional Statement, Pages 38-39).

The next contention of appellant in its own words is "Simply stated the proponents did not prove that the operating conditions in Arkansas are different from those in other states or in interstate operations." Such proof, of course, is not part of the respondent rail carriers' burden. It has long been settled beyond question that the required proof is merely a showing that operating conditions in intrastate commerce in the State in question are no less difficult or burdensome than operating conditions in connection with the handling of comparable interstate traffic, **King vs. United States** (1952), 344 U. S. 254, 271. Such proof was here presented in detail and in essentially the same manner which has repeatedly received the stamp of approval of the Commission and the Courts. As a matter of fact, the instant compelling situation enabled the rail carriers to prove that operating conditions as to Arkansas intrastate traffic were, if anything, significantly more difficult than those encountered in the handling of interstate traffic generally. Factors of record which clearly support such conclusion include: testimony that both types of traffic are often intermingled in the same trains; expla-

nations as to intrastate traffic's being handled to a proportionately greater extent in local trains, such handling involving higher costs by reason of relatively greater terminal expenses, higher rates of pay to local train crews, and more overtime expense; and testimony concerning the unique Arkansas full-crew law which adds an extra burden of expense found only in connection with Arkansas intrastate operations. (See, for example, Transcript Pages 119-128, 136-141, 143-145, 185-186 and 220, and Exhibits 24 through 32 and 43). Appellant's urging of an impractical, if not impossible, standard of proof as to this aspect of the case is contrary to all authority and clearly presents nothing of substance.

Appellant next presents an argument surrounding the question of who has the burden of proof. There is no dispute as to this. Respondent rail carriers admittedly have that burden, and in the instant situation it is clear, as properly found by the three-judge Court, that the voluminous and detailed evidence submitted includes substantial evidence supporting every facet of such burden. The features here raised by appellant have so frequently received the most authoritative consideration and are so clearly controlled by existing decisions, including **King vs. United States** (1952), 344 U. S. 254, that further discussion or response is completely unjustified.

In appellant's next secondary contention the question is raised as to whether this is, in fact, a revenue proceeding. In connection with such contention appellant, at Page 15 of its Jurisdictional Statement, draws completely inaccurate and unjustified conclusions from the there-quoted language taken from the three-judge Court decision. What is, in fact, observed by the lower Court is merely that in a proceeding such as the instant one—based upon a statewide general discrimination against interstate commerce—it is not necessary to deal with each of the thousands of individual rates and to show individually that each of such

rates is below a minimum reasonable level or that each individually results in a specific unlawful discrimination against an interstate rate.

The correctness of such statement is clearly established by the **King** case and the cases therein cited. The clear distinction between a "revenue" proceeding and a "rate" proceeding is repeatedly and consistently established by existing authorities, and certainly there is no occasion for further argument in connection therewith. Undeniably the instant proceeding is a revenue proceeding, and without question the standards applicable to such proceeding have here been properly applied.

The last contention of the appellant is, of course, as to the ultimate question: Is there anything here present which warrants further handling before the Supreme Court of the United States? We believe it to be abundantly clear that such question must be answered in the negative. Few, if any, areas of governing law have received so repeated and thorough analysis by our highest Court as has the instant one. The governing principles are already clearly set forth in the cited authority. Further rehashing of such established principles would serve no useful purpose. Contrary to appellant's suggestion, there are no existing conflicts in the law as expressed by the decisions of the several lower Courts. Each decision is necessarily rendered on the facts of record as presented in that particular proceeding. The circumstances that in one given situation the facts presented did not support the requested relief can have no influence whatsoever upon another proceeding such as the instant one, where an entirely different factual situation, as demonstrated by the controlling record, clearly does justify the relief as prayed and as accorded. The argument based on a claim that the involved increases in Arkansas result in rates in Arkansas higher than in Mississippi lacks both substance and relevancy. First of all, it is obvious that the failure

to accord these increases on Arkansas traffic would have created far more numerous disparities between intrastate rates in Arkansas and in other surrounding states. Secondly, the pertinent inquiry is not as to the relationship to intrastate rates in other states, but rather as to the relationship of the intrastate rates in question to interstate rates to, from, and within such State. The relief here accorded does nothing more than eliminate some of the existing unjustified differences between Arkansas intrastate rates and comparable interstate rates.

The alleged benefits which appellant envisions as a result of the requested review are obviously somewhat contrived. Actually, there exists no substantial doubts as to any of the features which appellant urges, for example, at Page 19 of its Jurisdictional Statement. As indicated, this Court has already given full consideration to the various problems posed by situations of this type and pursuant to such consideration, has clearly set forth all the necessary governing principles. Perhaps the best and most recent single treatment is to be found in the **King** case. It is submitted that a consideration of the three-judge Court decision below in the light of that governing decision can but lead to the conclusion that the judgment below correctly disposed of the matter and that further review would be entirely unwarranted.

CONCLUSION.

The Court below has without doubt correctly reviewed the entirety of the evidence before the Interstate Commerce Commission and, based upon such review, has reached the only supportable conclusion. The analysis of the Court below was strictly in accordance with the requirements of **Universal Camera Corp. vs. National Labor Relations Board** (1950), 340 U. S. 474. Appellant raises nothing whatsoever of substance, and hence, presents no justification for further review.

Accordingly, it is respectfully submitted that your honorable Court should dispose of this matter just as it has done in connection with entirely analogous situations, including that involved in **Louisiana Public Service Commission vs. United States of America and the Interstate Commerce Commission** (1954), 348 U. S. 885. Here, just as in that proceeding, the judgment and decree of the three-judge District Court should be affirmed. It is respectfully so moved.

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Certificate of Service.

I, Toll R. Ware, one of the attorneys for the rail carrier appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of July, 1957, I served copies of the foregoing Motion to Affirm on interested parties of record, including the following:

1. On the State of Arkansas by mailing copies duly addressed with first-class postage prepaid to their attorneys as shown on the Jurisdictional Statement.

2. On the United States of America by mailing copies in duly addressed envelopes to Osro Cobb, Attorney for the Eastern District of Arkansas, first-class postage prepaid, and to the Solicitor General, Department of Justice, Washington 25, D. C., airmail postage prepaid.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, airmail postage prepaid, to Samuel R. Howell, Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

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